UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	**CV 15-08673 RGK (SPx)**	Date	March 15, 2016
Title	***Wendy Chowning and Lourdes Casas v. Kohl's Department Stores, Inc. et al.***		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Order re: Defendant's Motion for Summary Judgment (DE 48)**

I. INTRODUCTION

On July 21, 2015, Wendy Chowning and Lourdes Casas, individually and on behalf of all others similarly situated ("Class Members"), filed a Complaint against Kohl's Department Stores, Inc. ("Defendant"). On January 20, 2016, the plaintiffs filed a First Amended Complaint ("FAC") in which Lourdes Cases was removed, leaving Wendy Chowning as the only named plaintiff ("Plaintiff"). The FAC alleges violations of the following California statutes: (1) False Advertising Law ("FAL"), (2) Unfair Competition Law ("UCL"), and (3) Consumer Legal Remedies Act ("CLRA").

Presently before the Court is Defendant's Motion for Summary Judgment. For the following reasons, the Court **GRANTS** Defendant's motion as to the monetary claims for restitution.

II. FACTUAL BACKGROUND

Plaintiff allege the following facts:

Defendant is a large national retailer that owns and operates approximately 100 retail stores within California. The majority of Defendant's sales have historically derived from exclusive and private label brands. These products are sold exclusively at stores owned, operated, and licensed by Defendant. As such, Defendant defines, sets, and controls all prices for these products.

Each exclusive and private label brand that Defendant offers for sale in its stores displays two prices: (1) the selling price and (2) a significantly higher price that is represented to be the item's "regular" or "original" price ("Actual Retail Price" or "ARP"). By simultaneously displaying these two prices, Defendant leads consumers to believe that they are receiving a certain discount. Plaintiff and putative class members reasonably believed that the ARPs represented the price at which Defendant regularly sold each respective item, and that they were receiving a significant discount. The price-comparison-advertising scheme induced Plaintiff and putative class members to purchase Defendant's private label items.

Plaintiff alleges that the ARPs affixed to each item in Defendant's California stores were false prices. Plaintiff also claims that the advertised ARPs were not the prevailing market retail prices within the three months immediately preceding the publication of the advertised ARPs, as required by California law. Therefore, Plaintiff asserts, Defendant falsely claims that each of its products has previously sold at a far higher ARP in order to induce Plaintiff and putative class members to purchase merchandise at a purportedly marked down "sale" price.

For instance, on September 13, 2014, Plaintiff purchased a private label dress ("Dress") from Defendant's store. The Dress featured an original price of $70.00 but was purportedly marked down to $21.00—a 70% discount. Plaintiff relied on this price-comparison-advertising scheme in purchasing the Dress. She claims, however, that the alleged markdown was untrue, misleading, and false. According to the FAC, the prevailing retail price for the Dress during the three months immediately prior to the advertisement was materially lower than $70.00 as advertised. Plaintiff also alleges that she purchased a private label robe ("Robe") advertised at an original price of $46.00 and a sale price of $26.99, private label activewear ("Activewear") at an original price of $30.00 and a sale price of $9.99. She claims that the Robe and Activewear also bore false sale prices to ensnare shoppers looking for a deal. (FAC ¶30-33, ECF No. 44.)

Plaintiff claims that she and thousands of putative class members were deceived and misled into buying products from Defendant that they would not have purchased if not for Defendant's false advertising. Plaintiff and putative class members lost money and/or property as a result of the fraudulent price-comparison-advertising scheme.

III. JUDICIAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper only where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that there is an absence of evidence to support the non-moving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Upon such showing, the court may grant summary judgment "on all or part of the claim." Fed. R. Civ. P. 56(a)-(b).

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. Fed. R. Civ. P. 56(e). Nor may the non-moving party merely attack or discredit the moving party's evidence. *Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific evidence sufficient to create a genuine issue of material fact for trial. *See Celotex Corp.*, 477 U.S. at 324. The materiality of a fact is determined by whether it might influence the outcome of the case based on the contours of the underlying substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over such facts amount to genuine issues if a reasonable jury could resolve them in favor of the nonmoving party. *Id*.

IV. DISCUSSION

Defendant moves for summary judgment on three bases. First, it argues that Plaintiff does not have standing to bring a claim under the FAL or UCL because she did not rely on the price-comparison advertising in purchasing the items. Second, Defendant contends that Plaintiff's claim for monetary relief fails because she could have avoided the claimed injury with minimal effort. Finally, Defendant posits that Plaintiff is not entitled to restitution, which is the only monetary relief available under the FAL and UCL.

A. Standing

According to Defendant, Plaintiff has failed to establish that she would not have purchased Defendant's merchandise absent the alleged misrepresentations. Therefore, Defendant argues, Plaintiff lacks standing to bring UCL and FAL claims

Under the UCL and FAL, Plaintiff may establish standing by proving *either* that she would not have purchased the product absent Defendant's false advertising *or* that she paid more than she would otherwise have paid as a result of the false advertising. *Hinojos v. Kohl's Corp*., 718 F.3d 1098, 1104 n.3 (9th Cir. 2013) (citing *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012); *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 890 (Cal. 2011). Here, Plaintiff has proffered sufficient evidence to satisfy standing.

Plaintiff submits evidence that she probably would not have purchased the items if she knew that the original price was false. Consider, for instance, the Robe advertised at an original price of $46.00 and a sale price of $26.99; Plaintiff stated in a deposition, "If I thought 26.99 was the original price for that robe, it's always on sale for 26.99, I probably would not have bought it." (Chowning Depo. 56:13-15, ECF No. 59.) Likewise, she testified that she purchased the Dress for $21 because she thought it was a "a great deal" based on the advertised original price of $70.00. (Chowning Depo. 17:3-9, ECF No. 59.)

In rebuttal, Defendant points to two questions in the deposition, which supposedly undermine Plaintiff's argument that the price-comparison advertising influenced her purchase decision.

> Q: If there was no regular price listed, just the $21, and you thought that $21 was a good value for the dress, would you have bought it?
>
> OPPOSING COUNSEL: Objection . . .
>
> A: I don't know.
>
> . . .
>
> Q: Now, if the robe was advertised without any regular price at all, all it said was 26.99, would you have bought the robe?
>
> OPPOSING COUNSEL: Objection . . .
>
> A: I don't know.

(Speyer Decl. Ex. A at 50:9-13, 60:5-10, ECF No. 48.) According to Defendant, "These admissions are fatal to [Plaintiff's] claims because . . . her answer was that she ***does not know*** if she would have bought the products absent the alleged misrepresentations." (Def.'s Mot. Summ. J. 5:15-20, ECF No. 48) (emphasis in the original). The Court disagrees.

The recited testimony does not affirmatively demonstrate that Plaintiff would still have purchased the items in the absence of price-comparison advertising. At most, the answers demonstrate an uncertainty or hesitation that can just as plausibly be explained by Plaintiff's inability to comprehend the questions. In fact, Plaintiff later submitted a deposition errata, pursuant to Federal Rule of Civil

Procedure 30(e)[1], in which she clarified these two responses. According to Plaintiff, these responses reflect her inability to determine whether a given price is a bargain. In answering, "I don't know," Plaintiff was effectively stating that she had no way of gauging whether the given prices in the hypothetical scenarios ($21 for the dress and $26.99 for the robe) were a good value.

Defendant invokes the "sham affidavit" rule and argues that Plaintiff's deposition errata is nothing more than a tactical move to create a triable issue of fact. In the Ninth Circuit, a party cannot create a genuine issue of material fact to defeat summary judgment by submitting an affidavit that contradicts prior sworn deposition testimony. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). The Ninth Circuit has extended the "sham affidavit" rule to deposition errata submitted under Rule 30, holding that such errata must include only "corrective, not contradictory, changes." *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217, 1226 (9th Cir. 2005). "To determine whether a submission of deposition errata is a sham, a court may consider circumstances such as the number of corrections, whether the corrections fundamentally change the prior testimony, the impact of the corrections on the case (including the extent to which they pertain to dispositive issues), the timing of the submission of corrections, and the witness's qualifications to testify. *Lewis v. THe CCPOA Benefit Trust Fund*, No. C-08-03228, 2010 WL 3398521, at *2 (N.D. Cal. Aug. 27, 2010).

After a careful consideration of the circumstances, the Court accepts Plaintiff's deposition errata. The deposition errata here contains 26 corrections—only two of which have been challenged—all of which are supported by ample clarification. The two corrections at issue do not fundamentally change Plaintiff's prior deposition testimony. In the deposition, Plaintiff was asked whether, absent any price-comparison advertising, she would still purchase the dress for $21 and the robe for $26.99. The deposition errata explains that Plaintiff answered, "I don't know," because she wasn't sure how to determine whether the prices proposed by Defendant's counsel ($21 for the dress and $26.99 for the robe) would actually be a good deal. Such a clarification does not contradict her previous answer; it simply explains an equivocal response. In fact, the two corrections here are further corroborated by the remaining deposition testimony where Plaintiff repeatedly testified that the price-comparison advertising influenced her purchasing decision. Moreover, nothing about the timing of the corrections appears suspicious, as Plaintiff completed the errata *before* Defendant filed its Motion for Summary Judgment. Finally, Plaintiff is eminently qualified to testify, as the testimony bears directly on her own subjective purchasing decision.

Accordingly, the Court finds that Plaintiff has proffered sufficient evidence to create a triable issue of fact as to whether she would have purchased Defendant's merchandise absent the price-comparison scheme. Plaintiff also submits evidence that she has standing under the second basis identified above (i.e., that she paid more than she would otherwise have paid as a result of Defendant's false advertising). The Court need not address this second basis for standing, having ruled that the evidence suffices to establish standing under the first basis.

B. Avoidable Injury

Defendant argues that the claims for monetary relief under the UCL, FAL, and CLRA all fail because Plaintiff could have avoided her claimed injury with minimal effort. *Commodity Credit Corp. v. Rosenberg Bros. & Co.*, 243 F.2d 504, 511 (9th Cir. 1957) ("[A plaintiff] can recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided."). According

[1] "If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them." Fed. R. Civ. P. 30(e).

to Defendant, Plaintiff does not claim that she purchased items with a value lower than the purchase price. Because the items were not worth less than the price Plaintiff paid, "under no circumstances could [Plaintiff's] injury exceed the amount she paid for the products." (Def.'s Mot. Summ. J. 6:16-17, ECF No. 48.) Therefore, Defendant continues, "the remedy Plaintiff seeks as 'restitution' is a refund of the amount she paid, accompanied by her return of the products to [Defendant]." (Def.'s Mot. Summ. J. 6:17-18, ECF No. 48.) Based on the premise that Plaintiff is, at most, entitled to a refund, Defendant argues she could have obtained the exact relief she now seeks by taking advantage of Defendant's "extraordinarily liberal return policy." (Def.'s Mot. Summ. J. 7:1, ECF No. 48.)

In arguing that Plaintiff could have avoided her injury simply by returning her items for a full refund, Defendant conflates *injury* with *remedy*. Plaintiff could not have possibly taken steps to avoid her *injury* without knowing about Defendant's allegedly deceptive price-comparison advertising. Indeed, a consumer is injured as soon as she relies on a defendant's deceptive advertising and parts with more money than she otherwise would have paid. *Pulaski*, 802 F.3d at 989 ("Where plaintiffs are 'deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately.'")

Instead of *injury*, it appears that Defendant actually takes issue with the *remedy* Plaintiff seeks. Defendant essentially argues that the only possible monetary relief available to Plaintiff is a full refund—a remedy she could have easily obtained by returning the items. As such, Plaintiff is precluded from pursuing any claims for monetary relief. Defendant's argument as to monetary relief rests on the flawed assumption that the only form of restitution available to Plaintiff is a full refund. Even though Plaintiff in this case has not proposed a viable measure of restitution, she is not categorically limited to a full refund. Therefore, the Court rejects this argument.

C. Restitution Under California's Consumer Protection Laws

The final point of contention between the parties is whether Plaintiff has proposed an appropriate measure of restitution given the circumstances of this case. The Court concludes Plaintiff has not.

"The False Advertising Law, the Unfair Competition Law, and the CLRA authorize a trial court to grant restitution to private litigants asserting claims under those statutes." *Colgan v. Leatherman Tool Grp., Inc.*, 38 Cal. Rptr. 3d 36, 58 (Ct. App. 2006). The UCL and FAL contain identical statutory language, which provides that "court[s] may make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Cal. Bus. & Prof. Code §§ 17203, 17535. Under the CLRA, plaintiffs are entitled to restitution as well as actual and punitive damages. Cal. Bus. & Prof. Code §§ 1780(a)(1)-(5). "There is nothing to suggest that the restitution remedy provided under the CLRA should be treated differently than the restitution remedies provided under the False Advertising or Unfair Competition Laws." *Colgan*, 38 Cal. Rptr. 3d at 58.

The purpose of restitution under California's consumer protection laws is twofold: restoring the victims' property or money and deterring future deceptive practices. The California Supreme Court has emphasized that these two goals are concurrent, not independent. Even though "the Legislature considered deterrence of unfair practices to be an important goal, the fact that attorney fees and damages, including punitive damages, are not available under the UCL [or FAL] is clear evidence that deterrence by means of monetary penalties is not the act's sole objective. A court cannot, under the equitable powers, award whatever form of monetary relief it believes might deter unfair practices." *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 946 (Cal. 2003).

In its simplest form, restitution is simply "the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received." *Cortez v. Purolator Air Filtration Products Co.*, 999 P.2d 706, 713 (2000). While the principle of restitution is simple to articulate, it can be confounding to apply in certain situations. The most straightforward application of restitution is the price/value differential in which the Plaintiff receives the difference between the price she paid and the value of the item she received. Of course, the price/value differential is not the exclusive measure of restitution, as two recent appellate decisions, one from California and one from the Ninth Circuit, have ruled.

The first case, *In re Tobacco Cases II*, involved misleading labels that advertised "Marlboro Lights" as containing "lowered tar and nicotine." 192 Cal. Rptr. 3d at 888 (Ct. App. 2015). Consumers brought a class action under the UCL and sought a full refund of the purchase price as restitution. *Id.* at 892. The trial court "determined that since plaintiffs received value from Marlboro Lights apart from the deceptive advertising, the proper measure of restitution was the difference between the price paid and the actual value received." *Id.* at 889. The district court went on to dismiss the case because plaintiffs failed to establish that the value of the Marlboro Lights was lower than the price they paid. *Id.* at 890.

The plaintiffs appealed and argued that they were entitled to alternative forms of restitution beyond the traditional price/value differential. The California Court of Appeal began by acknowledging that price/value differential "does not purport to set forth the exclusive measure of restitution potentially available in a UCL case. It remains, however that plaintiffs ha[ve] the burden of proving entitlement to an alternative measure of restitution proper under all the circumstances." *Id.* at 893. The court then considered the alternative measure of restitution proposed by plaintiffs: a full refund of the purchase price. After examining the circumstances of the case before it, the court concluded,

> While a full refund may be proper when a product confers no benefit on consumers, such is not the scenario here. Plaintiffs do not dispute the court's finding that they obtained value from Marlboro Lights apart from the deceptive advertising. Indeed, it appears inherently implausible to show a class of smokers received no value from a particular type of cigarette. Under the circumstances, the [price/value differential] measure of restitution was proper, and as plaintiffs did not establish any price/value differential the court lacked discretion to award restitution.

Id. at 901. In essence, the court held that a full refund is not appropriate in a situation where the plaintiff has received some value from the product, but it also rejected the notion that price/value differential constitutes the only measure of restitution.

Another recent decision, this one from the Ninth Circuit, bears directly on the issue of alternative restitution measures. *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979 (9th Cir. 2015). In *Pulaski*, the plaintiffs used Google's Adwords program, which allowed them to bid for advertisement placement on various websites of their choosing; Google, however, failed to inform plaintiffs that their advertisements could appear on certain other websites that they had not authorized. *Id.* at 982-83. Plaintiffs were charged each time a consumer clicked on their advertisements—even those advertisements placed on websites that plaintiffs did not choose or know about. *Id.* Consequently, plaintiffs sued Google under the UCL and FAL, proposing a measure of restitution based on "the difference between what [plaintiffs] actually paid and what they would have paid had Google informed them" of the undisclosed websites. *Id.* at 983. Admittedly, plaintiffs did gain some value from having their advertisement placed on the unauthorized websites, which prompted the district court to reject plaintiffs' measure of restitution because it did not account for the benefits that plaintiffs acquired. *Id.* at 984. The Ninth Circuit reversed, holding that "UCL and FAL restitution is based on what a purchaser would have paid at the time of purchase had the purchaser received all the information." *Id.* at 989. The

Ninth Circuit in *Pulaski* did not eschew the traditional definition of restitution, it merely clarified that alternative measures of restitution may be appropriate based on the circumstances of each case. For instance, in situations where a defendant's misrepresentations induce the plaintiff to part with money for a service or good, "the focus is on the difference between what was paid and what a reasonable consumer would have paid at the time of purchase without the fraudulent or omitted information." *Id*.

A survey of the relevant case law on restitution under California's consumer protection laws reveals three limiting principles this Court must heed in fashioning an appropriate remedy. First, restitution cannot be ordered exclusively for the purpose of deterrence. *In re Tobacco Cases II*, 192 Cal. Rptr. 3d at 894 ("[W]ell-settled law, including California Supreme Court authority [holds] that restitution under the UCL may not be based solely on deterrence, no matter how egregious the defendant's conduct."). Second, even though plaintiffs may pursue alternative forms of restitution, any proposed method must account for the benefits or value that a plaintiff received at the time of purchase. *Id.* at 893. Finally, the amount of restitution ordered must represent a measurable loss supported by the evidence. *Colgan*, 38 Cal. Rptr. 3d at 61 ("From the authorities we conclude that restitution under the [consumer protection laws] must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence.").

With the foregoing principles in mind, the Court analyzes Plaintiff's proposed restitution models.

1. Full Refund Model

The first proposed method of restitution is the Full Refund Model, which is "designed to return [Plaintiff's] full purchase price, conditioned on a return of the product." (Pl.'s Opp'n to Mot. Summ. J. 19:5-7, ECF No. 60.) Under this model, Plaintiff "could ask for the entire amount she spent to purchase any item that was sold at a . . . false or misleading 'Regular' price." (Bergmark Decl. ¶36, ECF No. 60.)

The Court disapproves of the Full Refund Model under the present circumstances. This model fails to account for the value Plaintiff received and, therefore, runs afoul of the limiting principle discussed above. *In re Tobacco Cases II*, 192 Cal. Rptr. 3d at 895 ("A full refund *may* be available in a UCL case when the plaintiffs prove the product had *no* value to them.") (emphasis in the original).

In fact, numerous district courts have held that consumers alleging mislabeling or deceptive advertising are not entitled to a full refund where the challenged product conferred some benefit notwithstanding the false advertising. *In re POM Wonderful LLC*, No. ML 10-02199, 2014 WL 1225184, at *3 (C.D. Cal. Mar. 25, 2014) ("Because the Full Refund model makes no attempt to account for benefits conferred upon Plaintiffs, it cannot accurately measure [restitution]"); *Brazil v. Dole Packaged Foods, LLC*, No. 12-CV-01831, 2014 WL 2466559, at *15 (N.D. Cal. May 30, 2014) ("[Plaintiff's] full refund model is deficient because it is based on the assumption that consumers receive no benefit whatsoever from purchasing the identified products."); *Caldera v. J.M. Smucker Co.*, No. CV 12-4936, 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014) ("As evidenced by Plaintiff's own deposition testimony, class members undeniably received some benefit from the products. Awarding class members a full refund would not account for these benefits conferred upon class members.").

On the contrary, courts have approved a full refund as a measure of restitution in those cases where the consumers alleged that the challenged products provided absolutely no value. *Allen v. Hyland's Inc.*, 300 F.R.D. 643, 671 (C.D. Cal. 2014) ("Plaintiffs' contention that they are entitled to full restitution is linked to their theory that the products they paid for are worthless because they did not provide any of the advertised benefits and had no ancillary value."); *Allen v. Similasan Corp.*, 306 F.R.D. 635, 649 (S.D. Cal. 2015) ("Here, restitution is the equivalent of out-of-pocket expenses because, under Plaintiffs' theory, the purchased Products are ineffective and therefore worthless.").

Here, neither party disputes that the Dress, Robe, and Activewear each provided some value. In Plaintiff's deposition she testified that she was not dissatisfied with the quality of her purchases. (Chowning Depo. 34-36, ECF No. 59.) Because Plaintiff concedes that she received some benefit from the items, the Full Refund Model is inappropriate.

Plaintiff invokes *Spann v. JC Penny* in support of her argument that the Full Refund Model is an appropriate measure of restitution. No. SA CV-12-0215, 2015 WL 1526559 (C.D. Cal. Mar. 23, 2015). In *Spann*, consumers brought claims under the UCL, FAL, and CLRA alleging that JC Penny used a false price-comparison-advertising scheme identical to the one at issue here. *Id.* at *1-2. That is, JC Penny allegedly mislabeled their items as having a deceptively high "Original Price" to induce consumers to purchase the items. *Id.* The *Spann* court approved restitution in the form of a full refund and explained "[P]laintiff has presented evidence that every dollar she spent was as a result of JC Penney's alleged false advertising, and defendant cites no evidence . . . to demonstrate that a full refund would not be proper under the facts of this case." *Id.* at *6. The *Spann* court rejected the notion that a proper measure of restitution must account for any benefit the plaintiff received during the transaction. *Id.* at *4. In so holding, the court distinguished a California Supreme Court decision suggesting that value must be considered when calculating restitution. *Cortez*, 999 P.2d at 713.

In *Cortez*, the California Supreme Court analyzed whether an order to pay withheld overtime wages qualified as restitution under the UCL. 999 P.2d at 712. The Court began its analysis by explaining the difference between damages and restitution:

> "Damages," as that term is used to describe monetary awards, may include a restitutionary element, but when the concepts overlap, the latter is easily identifiable. Damages for fraud are an example. California Civil Code § 3343 . . . [W]hile the award of [fraud] damages may be greater than the sum fraudulently acquired from the plaintiff, *the award includes an element of restitution – the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received.* To that extent the award of damages literally includes restitution. By contrast, a damages award in a negligence action in tort may include monetary compensation for lost wages, pain and suffering, physical injury, and property damage. That damage award would not include an element of restitution.

Id. at 712 (emphasis added). The *Spann* court distinguished the *Cortez* case on the grounds that the recited language above "is irrelevant to restitution, as the court was analyzing California Civil Code § 3343, which limits damages in fraud actions, not the availability of equitable remedies." *Spann*, 2015 WL 1526559 at *4 n.7.

This Court parts ways with *Spann* and reads the *Cortez* decision differently. In *Cortez*, the Court's analysis was not simply limited to fraud or California Civil Code § 3343; rather, the Court was confronted with a novel issue regarding the scope of restitution under the UCL. To decide the issue, the Court returned to basic principles of restitution and damages. In the recited passage above, the *Cortez* court juxtaposed negligence remedies and fraud remedies to illustrate the difference between "damages" and "restitution." In doing so, the Court highlighted that restitution accounts for both the "what the plaintiff gave" and the "value of what the plaintiff received." Thus, the Court's holding was not limited to fraud; instead, the Court used fraud and negligence as contrasting examples to illustrate the larger principle that restitution, as distinguished from damages, must account for any value the plaintiff received. Accordingly, the Court declines to follow *Spann* and disapproves of the Full Refund Model.

2. *Disgorgement of Profits*

Next, Plaintiff proposes a measure of restitution based on disgorgement of profits Defendant earned on the deceptively labeled merchandise. Plaintiff's expert has determined that Defendant realized the following profits: $8.95 on the Dress, $15.51 on the Robe, and $5.21 on the Activewear. (Bergmark Decl. ¶44, ECF No. 60.)[2] The Court also disapproves of this method.

"Disgorgement as a remedy is broader than restitution or restoration of what the plaintiff lost." *Am. Master Lease LLC v. Idanta Partners, Ltd.*, 171 Cal. Rptr. 3d 548, 572 (Ct. App. 2014). The California Supreme Court has held that the UCL only allows restitutionary disgorgement, as opposed to nonrestitutionary disgorgement. *Korea Supply Co.*, 63 P.3d at 946 ("This court has never approved of nonrestitutionary disgorgement of profits as a remedy under the UCL."). The Court went on to define restitutionary disgorgement, "Under the UCL, an individual may recover profits unfairly obtained *to the extent that these profits represent monies given to the defendant* or benefits in which the plaintiff has an ownership interest." *Id.* at 947 (emphasis added). In other words, restitutionary disgorgement is "not concerned with restoring the violator to the status quo ante. The focus instead is on the victim." *Madrid v. Perot Sys. Corp*., 30 Cal. Rptr. 3d 210, 221 (Ct. App. 2005). Thus, the amount of restitutionary disgorgement cannot simply be the profit that a defendant earns by defrauding a plaintiff, instead it must represent the amount the plaintiff lost as a result of the defendant's deceptive practices.

The court in *In re Tobacco Cases II* addressed a situation identical to the instant case. 192 Cal. Rptr. 3d at 899-900. There, the plaintiffs requested a disgorgement of all profits defendant had earned on the deceptively advertised Marlboro Lights. *Id.* The court began by reiterating that the purpose of restitutionary disgorgement is to return to the plaintiff the measurable amount she lost as a result of defendant's fraudulent behavior. *Id.* Thus, where a plaintiff derives some benefit from the mislabeled product, a disgorgement of full profits fails to accurately capture the plaintiff's loss because it does not account for value received. *Id.* Here, much like in *In re Tobacco Cases II*, Plaintiff does not dispute that she gained some value from the mislabeled items. Therefore, a disgorgement of full profits would be inappropriate because the amount of Defendant's profit does not accurately represent the amount Plaintiff lost in this case. *Trazo v. Nestle USA, Inc.*, 113 F. Supp. 3d 1047, 1052 (N.D. Cal. 2015) ("The proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received, *not the full purchase price or all profits*.") (emphasis added).

Plaintiff again invokes the *Spann* decision where the court allowed disgorgement of profits as a measure of restitution. 2015 WL 1526559 at *8. There, the court acknowledged the difference between restitutionary and non-restitutionary disgorgement and explained that the "distinction between [the two types] turns on whether the money plaintiff seeks was obtained by the defendant from the plaintiff in the first place. If so, disgorgement is restitutionary." *Id.*

This Court disagrees. While the *Spann* court correctly pointed out that the distinction between restitutionary and non-restitutionary disgorgement depends on whether the money to be returned was taken from the plaintiff, that is not the end of the analysis. Other limiting principles exist and must be considered in fashioning an appropriate restitution remedy. For instance, in discussing restitutionary disgorgement, the California Supreme Court has explained that "an individual may recover profits unfairly obtained *to the extent that these profits represent monies given to the defendant*." *Korea Supply Co.*, 63 P.3d at 947. (emphasis added). Thus, a plaintiff is not merely entitled to any profit that a defendant fraudulently earns; rather, she is entitled only to those profits that represent money she lost. Indeed, such a reading comports sensibly with another limiting principle of restitution, namely, a plaintiff seeking to recover restitution must demonstrate a measurable loss supported by the evidence. *Colgan*, 38 Cal. Rptr. 3d at 61. Plaintiff's proposed model does not account for the actual amount she lost; instead, she merely seeks the full profit Defendant earned on the merchandise. Such a proposed measure is impermissible for the reasons articulated above.

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[2] To arrive at these figures, Plaintiff's expert simply subtracted Defendant's cost from the net purchase price. (Bergmark Decl. Ex. G, ECF No. 60.)

3. *Actual Discount Model*

Plaintiff proposes a measure of restitution dubbed the "Actual Discount Model." (Bergmark Decl. ¶39-40, ECF No. 60.)

Under this model, the first step is to determine the percentage of the discount represented by the false "Original Price." For instance, Plaintiff purchased the Dress at an advertised "Original Price" of $70.00 and a sale price of $21.00, representing a 70% discount.

Once the discount is calculated, the next step is to determine the actual "Original Price" of the item—not the purported $70.00 that Defendant represented. Plaintiff's expert has reviewed Defendant's sales data and determined that the Dress originally sold, on average[3], for $35.81 in the 90 days preceding Plaintiff's purchase. (Bergmark Decl. Ex. E, ECF No. 60.)

After determining the percentage discount (70%) and actual selling price ($35.81), the next step is to calculate how much Plaintiff would have paid if she had, in fact, received the promised discount on the actual selling price. In this case, Plaintiff would have only paid $10.75 if she had truly received the promised discount (70% of $35.81).

Finally, Plaintiff's restitution would be the difference between what she paid ($21.00) and what she would have paid ($10.75) if she had received the advertised discount, for a total of $10.25 ($21.00 - $10.75) in restitution. The following table shows the Actual Discount Model as applied to all of Plaintiff's items.

Item	**Advertised Original Price**	**Purchase Price**	**Actual Average Selling Price**	**Restitution Amount**
Dress	$70.00	$21.00 (70% discount)	$35.81	$10.25
Robe	$46.00	$26.99 (41% discount)	$27.86	$10.55
Activewear	$30.00	$9.99 (67% discount)	$14.79	$5.11

The Court disapproves of the Actual Discount Model because it is not actually a measure of restitution. Under California's consumer protection laws, restitution is intended to restore the status quo ante—to put Plaintiff in the same position she would have been if no transaction had occurred by returning any monetary loss. *People v. Beaumont Inv., Ltd.*, 3 Cal. Rptr. 3d 429, 455 (Ct. App. 2003) ("Where restitution is ordered as a means of redressing a statutory violation, the courts are not concerned with restoring the violator to the status quo ante. *The focus instead is on the victim*.")

[3] In addition to the average selling price, Plaintiff also calculated the mode, or most prevalent price, at which the items sold. Plaintiff proposes either the average or the mode as measures of the actual value of the item. Because the Court rejects this model of restitution, it is immaterial whether mode or average is used as a proxy for actual value.

(emphasis added); *Cortez*, 999 P.2d at 715 ("The status quo ante to be achieved by the restitution order was to again place the victim in possession of [the lost] money.").

To determine Plaintiff's loss for purposes of restitution, the focus should be on what Plaintiff *actually received* given the price she paid, not on the bargain Plaintiff *thought she was receiving*. As the chart above shows, Plaintiff's purchase price was lower than the actual average selling price for all three items. For instance, she paid $21.00 for a Dress that, on average, sold for $35.81. Instead of focusing on returning Plaintiff's lost money, the Actual Discount Model seeks to award Plaintiff the full benefit of the transaction she thought she was entering into—a measure more akin to expectation damages than restitution. Simply put, the Actual Discount Model fails because its focus is misplaced. Rather than looking to what Plaintiff gave up and what she received, this model erroneously emphasizes the value of the transaction Plaintiff had anticipated. *Vaccarino v. Midland Nat. Life Ins. Co.*, No. 2:11-CV-05858, 2014 WL 572365, at *10 (C.D. Cal. Feb. 3, 2014) ("Crucially, plaintiffs' damages model here does not compare what the [products] were worth to what plaintiffs paid. . . . Instead, as explained above, plaintiffs' model focuses entirely on the difference between what plaintiffs' claim *they should have received* and what they actually received.") (emphasis in the original).

Plaintiff cites the *Spann* decision where the court held that awarding plaintiffs the actual discount they expected would be an appropriate measure of restitution. 2015 WL 1526559 at *7. The defendant in *Spann* argued that a restitution model based on the full discount expected would not actually be restitution; rather, such a model would award plaintiffs their expectation damages. The court rejected the argument and explained, "defendant's argument conflates plaintiff's method of measuring the amount of restitution owed—based on her expectation of a discount—with the wholly distinct nature of plaintiff's interest in the money she seeks to have restored. Here, defendant accepted plaintiff's money in exchange for clothing items. Thus, plaintiff's interest in the money is not merely an expectation interest." *Id.* In other words, the *Spann* court held that because the plaintiffs had actually parted with money, they had more than merely an "expectation interest" in the money they sought returned. While it may be true that Plaintiff here had more than a mere "expectation interest" in the money she paid, that fact alone does not fully answer the restitution question. The Actual Discount Model seeks to award Plaintiff the bargain she expected to receive without any focus on the amount of money she lost in the process. As stated above, the purpose of restitution is to restore the victim to the same place as if no transaction had occurred by returning any fraudulently obtained funds. Therefore, the Court rejects the Actual Discount Model.

4. *Price/Value Differential*

The final measure of restitution Plaintiff proposes is the most traditional, the Price/Value Differential. Plaintiff argues that she "paid more than each item was actually worth. Accordingly, [she] should be entitled to restitution in the amount she overpaid." (Pl.'s Opp'n Mot. Summ. J. 20:9-11, ECF No. 60.) Based on Defendant's sales data, Plaintiff's expert has calculated four potential measures of retail value. The first two measures calculate the average selling price ("average") and the most frequent selling price ("mode") of each item in the 90 days preceding purchase. The second two measures calculate the average price and mode price over the life span of each item. The figures are represented below. (Bergmark Decl. Ex. F, ECF No. 60.)

Item	**Purchase Price**	**Prior 90 Days Average/Mode**	**Life Span Average/Mode**
Dress	$21.00	$35.81/$42.00	$28.60/$14.00
Robe	$26.99	$27.86/$26.99	$24.67/$23.00

Activewear	$9.99	$14.79/$17.99	$10.53/$6.00

The question then becomes, which of these four measures accurately captures retail value in this case? Plaintiff's expert proposes the mode price over the life span of each item. For instance, the retail value of the Dress would be $14.00 because that was the mode price at which the Dress sold over its life span. Accordingly, Plaintiff overpaid by spending $21.00 on a Dress worth only $14.00, meaning she is entitled to $7.00 in restitution. The Court rejects this measure of retail value, as it suffers from two fatal flaws.

The first problem is the period over which Plaintiff's expert calculated retail value. Plaintiff's model considers the retail value over the *life span* of the product as opposed to the *90 days* preceding purchase. Plaintiff's expert does not provide any evidence as to why the life span of the product represents a more accurate measure of retail value. In fact, the Court finds just the opposite; given the nature of this claim, the more suitable period would be the 90 days preceding purchase. The crux of Plaintiff's claim is that Defendant violated the following provision of the FAL:

> For the purpose of this article the worth or value of any thing advertised is the prevailing market price, wholesale if the offer is at wholesale, retail if the offer is at retail, at the time of publication of such advertisement in the locality wherein the advertisement is published.
>
> No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined *within three months next immediately preceding the publication of the advertisement* or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.

Cal. Bus. & Prof. Code § 17501 (emphasis added). In other words, Plaintiff claims that Defendant deceived consumers about the market price of its merchandise in the preceding 90 days. In light of this claim, it does not seem sensible to measure the retail value over the life span of each item because the value at issue—the value that Defendant misrepresented—is the retail value in the preceding 90 days. Thus, the appropriate time period is not the life span of each item.

The other problem stems from the fact that Plaintiff's expert proposes the mode price as the retail value of a product. The expert report, however, does not provide any reliable basis for concluding that the mode price, as opposed to the average price, is an accurate measure of retail value. In fact, in his deposition Plaintiff's expert admits that he does not have any empirical basis for suggesting that mode price is a proper measure of retail value.

> Q: You say, "For purposes of this analysis, I assume that the retail value of a product is the price that most customers are willing to pay for that product." What is the basis for that assumption?
>
> A: That that's the data that I have available to me, and that's the assumption that I made just for purposes of this calculation.

> Q: I understand that that's the assumption that you're applying for these calculations. I'm asking a slightly different question. What is the basis to assume that that is a measure of the retail value of a product?
>
> A: Again, that's just the assumption that I've made here. I'm not sure that I have a specific basis that I can identify other than this is the—based on the data that I've had, this is the most frequent price that occurred. And so I'm going to assume for purposes of this analysis that that is the retail value.
>
> . . .
>
> . .
>
> Q: So is another way of saying this that if someone else determines that retail value is determined based on the mode of a set of prices, then you're telling people here's how you do the calculation, *but you are not actually rendering an opinion about whether or not that assumption is correct*?
>
> A: Right. I'm not rendering an opinion on retail value. I'm rendering an opinion on prevailing market price based on the definition that is included in my analysis.

(Bergmark Depo. 21:24-22:17; 42:6-15, ECF No. 85.) (emphasis added). Accordingly, the Court rejects this entirely speculative measure, as Plaintiff has not proffered any evidence to demonstrate that mode price reflects the retail value of the merchandise. *Raschkovsky v. Allstate Ins. Co.*, No. CV1500216, 2015 WL 9463882, at *7 (C.D. Cal. Dec. 21, 2015) ("[E]xpert testimony based on unclear methodology, faulty reasoning, or pure speculation is inadmissible.") (citing *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014)). Even assuming mode price does properly capture the retail value, Plaintiff would still not be entitled to any restitution under this measure. The mode price of each item in the preceding 90 days exceeded the price Plaintiff paid, meaning that Plaintiff still received an item with a value higher than the price she paid.

Overall, none of the proposed models provide an appropriate measure of restitution given the facts of this case. The reasons for this outcome are twofold. First, Plaintiff failed to submit a viable measure of restitution, such as a "price premium" model in which an expert isolates the amount of the price attributable to the false representation. *See In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1118 (C.D. Cal. 2015) (explaining that the price premium calculation "contemplates the production of evidence that attaches a dollar value to the 'consumer impact or advantage' caused by the unlawful business practices").

Second, Defendant appears to have stumbled across a gap in statutory coverage with its price-comparison-advertising scheme. That is, a retailer can continue to advertise with false "original prices" and remain immune from paying restitution as long as the retail value of the items is higher than the price charged. For instance, a retailer can sell an item for $35 dollars between January and March, then advertise in April that the item has an "original price" of $80 but is now on sale for $30. Even though the item never sold for $80, the retailer can evade restitution under the price/value differential measure simply by arguing that, despite the misrepresentation, the value of the item ($35) exceeded the price consumers paid ($30). The risk of this behavior is particularly acute where, as here, a retailer maintains a private brand exclusively sold in its stores, meaning that there is no realistic measure of fair market value because no other retailers carry the item. If it appears that Defendant has exploited a shortcoming in California's consumer protection laws, the solution lies with the California legislature. This Court defers to the careful "balance struck in this state's unfair competition law between broad liability and limited relief." *Korea Supply Co.*, 63 P.3d at 949. The UCL and FAL authorize only restitution and injunctive relief. The fact that a defendant may have found a way to escape liability from monetary damages under the statutes as currently written is a matter best left to the legislature.

The Court concludes that Plaintiff has failed to demonstrate a viable measure of restitution under any of the models discussed above. Because the only available monetary relief under the UCL and FAL is restitution, the Court grants summary judgment in favor of Defendant as to claims for monetary relief under the UCL and FAL. The Court also grants summary judgment as to any claim for restitution under the CLRA.

D. The CLRA Claim

"The CLRA allows for restitutionary and injunctive relief, as well as compensatory and punitive damages and attorney fees." *Doe 1 v. AOL LLC*, 719 F. Supp. 2d 1102, 1110 (N.D. Cal. 2010); Cal. Bus. & Prof. Code §§ 1780(a)(1)-(5), (e). The Court's holding above disposes of Plaintiff' claim for restitution under the CLRA, but does not address any other available remedies allowed under the CLRA.

Defendant argues that Plaintiff's claim for monetary relief under the CLRA fails because she is not entitled to "actual damages" or "restitution of property." (Def.'s Mot. Summ. J. 16:25-17:4, ECF No. 48.) Even if Plaintiff is foreclosed from bringing a claim for restitution under the CLRA, she may still seek other forms of monetary relief such as punitive damages and attorney fees. §§ 1780(a)(4), (e). Defendant conveniently ignores this statutory language and focuses only on actual damages and restitution. The Court rejects this argument.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's Motion for Summary Judgment as to the claims seeking restitution under the UCL, FAL, and CLRA.

IT IS SO ORDERED.

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Initials of Preparer _______________